MOTION FILED

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No. 95-1016

In The

Supreme Court of the United States

October Term, 1995

KATHLEEN QUICK,

Petitioner,

v.

NATIONAL AUTO CREDIT, INC.
f/k/a AGENCY RENT-A-CAR, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION OF KENDRICK WILHITE FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER KATHLEEN QUICK

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MOTIONS FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Kendrick Wilhite moves the Court to enter its order granting him leave to file an amicus brief in support of the petition for certiorari of Kathleen Quick filed with the United States Supreme Court on or about December 26, 1995.

Consent for leave to file an amicus brief has been sought from all parties. Petitioner Kathleen Quick has, by and through her counsel, consented. Respondent, National Auto Credit, Inc. f/k/a Agency Rent-A-Car, Inc. has refused to grant consent.

The nature of the interest of movant, Kendrick Wilhite, is such that the Eighth Circuit Court of Appeals has held that his assignment to Kathleen Quick of his claim for bad faith against Agency Rent-C-Car, Inc., arising out of a contractual relationship, is invalid. In addition, the Eighth Circuit purported to rule on the merits of the claim of bad faith which Wilhite endeavored to assign to Kathleen Quick while at the same time, and in the same opinion, concluding that the claim had not been properly assigned to Kathleen Quick and was therefore not before the Court for its consideration.

Kendrick Wilhite was not a party to the suit instituted in the United States District Court for the Western District of Missouri giving rise to the appeal and opinion issued by the Eighth Circuit Court of Appeals which petitioner Kathleen Quick now seeks to have reviewed by the Supreme Court on her petition for certiorari. The Eighth Circuit should not have reversed the judgment and verdict of the jury, or alternatively, should not have

addressed the merits of the claim for bad faith. Either the claim was properly assigned and properly asserted by an assignee with standing, or was not before the court at all.

It is believed that the petition for certiorari of Kathleen Quick does not adequately address the dilemma created by the opinion of the Eighth Circuit Court of Appeals in view of its determination that the claim of bad faith was not properly assigned, coupled with its ruling on the merits of the claim which, if not properly assigned, could not have been properly before the Court for consideration.

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QUESTIONS PRESENTED

1. Should the Eighth Circuit be allowed to rule that a claim prosecuted through trial was not properly assigned to the Petitioner, judgment creditor of the assignor, and in addition, rule on the merits of the claim which the judgment debtor (assignor) had undertaken to assign to the Petitioner, thereby rendering judgment on a claim or property interest not properly before the court, while the assignor was not a party to the suit and not before the court?

2. Should the Eighth Circuit be allowed to hold that a claim or cause for action, constituting a property interest, may not be assigned by a judgment debtor to a judgment creditor for valuable consideration?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 65 F.3d 741 (8th Cir. 1995). Judgment entered by the United States District Court for the Western District of Missouri on the jury verdict is unreported. A related opinion was issued by the Missouri Court of Appeals: *Quick v. Wilhite*, 895 S.W.2d 90 (Mo.App. 1995).

JURISDICTION

A jury verdict was rendered on the 28th day of September, 1994 and judgment of the United States District Court for the Western District of Missouri was entered thereon on the same date. The opinion of the United States Court of Appeals for the Eighth Circuit reversing the judgment was issued on the 12th day of September, 1995. Kathleen Quick submitted a petition for rehearing en banc and before the panel to the United States Court of Appeals for the Eighth Circuit on the 26th day of September, 1995. The petition for rehearing en banc and for rehearing by the panel was denied by the United States Court of Appeals for the Eighth Circuit on November 2, 1995. Jurisdiction of the United States Supreme Court has been sought by the petitioner, Kathleen Quick, pursuant to Title 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

BRIEF OF AMICUS CURIAE SUBMITTED BY KENDRICK WILHITE

Summary of Argument

Kendrick Wilhite sought to protect his economic interests by assigning his contract based claims against Agency Rent-A-Car, Inc. to Kathleen Quick. The claims or causes of action arose out of a failure on the part of the car rental company to defend him in a wrongful death suit, as well as its failure to settle the suit within the limit of liability protection which was afforded to him under the terms of his car rental contract.

The assigned claims of breach of contract and bad faith were successfully prosecuted to jury verdict by Wilhite's assignee, Kathleen Quick.

The United States Court of Appeals for the Eighth Circuit held that the claim for breach of contract was validly assigned and that the tort claim of bad faith arising out of the contractual relationship was not validly assigned. In the context of its opinion however, the Eighth Circuit addressed the merits of what it held was not a validly assigned bad faith claim. The opinion of the United States Court of Appeals for the Eighth Circuit in ruling on a claim which it determined was not properly assigned and therefore not asserted by a party with standing before the Court, constitutes a violation of Wilhite's Fifth Amendment rights to due process. The opinion purports to weigh and address the merits of a claim which the Eighth Circuit implicitly determined by its holding was neither before the trial court or before the Eighth Circuit by virtue of an invalid assignment of a tort claim.

Argument

A claim or cause of action is a species of property which this Court has held is protected by the constitutional considerations pertaining to due process rights. *Tulsa Collection Servs. v. Pope*, 485 U.S. 478, 99 L. Ed. 2d 565, 108 S. Ct. 1340 (1988). Wilhite was not a party to the suit instituted by Kathleen Quick against Agency Rent-A-Car, Inc. wherein claims were asserted for breach of contract and bad faith. Those claims were assigned by Wilhite to Kathleen Quick so that he might protect his own economic interests and avoid possible garnishment or collection activity being undertaken against him, premised upon the default judgment obtained by Kathleen Quick against him. It should be remembered

that default judgment was obtained because of the failure of contract performance on the part of Agency Rent-A-Car, Inc.

Wilhite did not at any time endeavor or purport to assign any claim or cause of action for personal bodily injuries. The claims which he assigned were those arising out of or relating to the failure of Agency Rent-A-Car, Inc. to perform its contractual obligations to defend and settle claims against him which arose by virtue of an automobile accident in which he was involved while operating a rented automobile.

Subsequent to the assignment and during the course of discovery and trial of the suit, Wilhite was merely a witness. He was never a party.

The determination by the Eighth Circuit Court of Appeals that Wilhite possessed no bad faith claim is clearly contrary to existing law. Moreover, that determination is in clear violation of admonition that federal appellate courts should not endeavor to resolve disputes not properly before it. *Singleton v. Wulff*, 428 U.S. 106, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976).

Simply put, assuming arguendo that the Eighth Circuit Court of Appeals' determination that a bad faith claim was not properly assigned by Wilhite to Quick, then the claim was not before the trial court or before the Eighth Circuit as Quick had no standing to assert the claim of bad faith. The Eighth Circuit Court of Appeals' speaking to the merits of a claim not properly before it constitutes an unlawful deprivation of a protected and tangible property interest.

The United States Supreme Court has held that lack of standing to assert a claim or cause is jurisdictionally fatal and bars adjudication of a claim before the Court. Holding otherwise would be in violation of the Article III requirement of justiciability. *Allen v. Wright*, 468 U.S. 737, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984). The Missouri Supreme Court has held that standing is akin to jurisdiction over the subject matter, in limine, and as such, the question of a party's standing can be raised at any time, even sua sponte by the Court. *State ex rel. Mathewson v. Election Commissioners*, 841 S.W.2d 633 (Mo. 1992). The instruction of these case authorities is such that the Eighth Circuit Court of Appeals was in error in determining that the claim of bad faith was not properly assigned to Quick, or was in error in addressing the merits of a claim as not properly brought before a court by a party with standing to assert the claim.

There is in fact no policy reason for prohibiting a disposition, transfer or assignment of a claim or cause of action, whether sounding in contract or in tort, arising out of a breach of a contractual relationship. The Eighth Circuit Court of Appeals was plainly wrong in its determination that the claim for bad faith had not been properly assigned. The Eighth Circuit's authoritative justification indicated for this conclusion in the opinion reveals that the Eighth Circuit was relying upon case authorities expounding upon the social policy prohibition against assigning claims for personal bodily injury.

As this Court has pointed out in *Singleton v. Wulff*, 428 U.S. 106, a federal court should hesitate before resolving a controversy on the basis of rights of third persons which are not parties to the litigation. Wilhite was not a

party to the underlying litigation. He was a witness. The opinion of the Eighth Circuit purportedly accomplishes that which Wilhite himself could not have done, that is, splitting his cause of action against Agency Rent-A-Car, Inc.

Wilhite now occupies the unenviable position of endeavoring to assert, in his own name, and on his own behalf, what the Eighth Circuit Court of Appeals has determined to be an unassigned claim for bad faith against Agency Rent-A-Car, Inc. in the face of an opinion by the Eighth Circuit Court of Appeals which adversely addressed the merits of that claim which was fully litigated by Kathleen Quick.

Assuming the Eighth Circuit Court of Appeals was correct in its determination that the claim for bad faith was unassignable, its opinion addressing that claim should have ended after that determination.

Either Kathleen Quick had standing to assert the bad faith claim by virtue of the assignment, or she did not. The Eighth Circuit Court of Appeals should not be allowed to address the merits of a property interest or its value without the owner of that property interest being a party to the litigation. In doing so, the Eighth Circuit Court of Appeals has engaged in conduct which may well deprive Wilhite of a valuable property interest without due process of law in violation of the Fifth Amendment.

CONCLUSION

It is respectfully submitted that the decision of Eighth Circuit Court of Appeals was incorrect in numerous respects, most of which are more fully addressed in the petition for certiorari submitted by Kathleen Quick. The United States Supreme Court should grant certiorari and correct the injustices occasioned by the violation of constitutional rights visited upon Kathleen Quick and Kendrick Wilhite by the conduct of the Eighth Circuit Court of Appeals and reverse the judgment of the Eighth Circuit Court of Appeals entirely, reinstating the judgment entered on the jury verdict.

Alternatively, this Court should grant certiorari to clarify the fact that any position or discussion within the Eighth Circuit opinion regarding the merits of the claim of bad faith which Wilhite endeavored to assign to Quick is mere dicta and improper in that it was not necessary to a determination of a claim which the Eighth Circuit Court of Appeals held was not validly before it.

Respectfully submitted,

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